TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 238.

LOREN M. HEWIT, AS TRUSTEE IN BANKRUPTCY OF CLARA E. KELLOGG, APPELLANT,

vs.

THE BERLIN MACHINE WORKS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 3, 1906.

(18,852.)

21128

(18,852.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

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LOREN M. HEWIT, AS TRUSTEE IN BANKRUPTCY OF CLARA E. KELLOGG, APPELLANT,

vs.

THE BERLIN MACHINE WORKS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1903.

United States Circuit Court of Appeals.

1

SECOND CIRCUIT.

IN THE MATTER OF CLARA E. KELLOGG, A Bankrupt.	In Bankruptcy, No. 448.

IN THE MATTER OF The Claim of THE BERLIN MACHINE WORKS.	

2

Stipulated by and between the attorneys in the above entitled matter that the Clerk print from the records now on file in his office the following, but without waiving any substantial right and the right hereafter to require more of the proceedings, records or testimony to be hereafter printed if the materiality hereafter appears, viz.:

3

Statement.

Review of Decision of the United States District Court for the Western District of New York.

April 22d, 1901, Loren M. Hewitt, as Trustee in Bankruptcy, having possession of the real estate and machinery including the machines in controversey referred to in the papers herein, made and filed his verified petition for the sale of said real estate, buildings and machinery, free and clear of all liens and incumbrances.

4 April 24th, 1901, an order was made upon said petition for the usual ten days' notice to creditors to show cause why said property should not be sold free and clear from all liens and incumbrances and why the amount and validity of liens and incumbrances should not be determined. Such notice was served for May 14th, 1901, and thereafter the Berlin Machine Works appeared by counsel and filed the claim and petition (hereto annexed and marked "A)."

Proof was given before and an opinion written by the Referee dated, June 22d, 1901, (hereto annexed and marked "B,") and a decision made by the Referee in pursuance of said opinion.

5 A petition was then filed by the Berlin Machine Works for a review of the decision of the Referee and the Referee immediately made a certificate to the United States District Court (hereto annexed and marked "C").

December 22, 1902, the United States District Judge wrote an opinion and made a decision reversing the Referee (hereto annexed and marked "D" and "E").

December 23, 1901, a petition for review of the decision of the United States District Court by the Circuit Court of Appeals (Second Circuit) was filed by the Trustee herein (hereto annexed and marked "F").

6 Upon the trial before the Referee, under the objection that it was no proof of value, the claimant made the offer that if the machines in controversy were turned over to the Berlin Machine Works absolutely and unconditionally and it were allowed to obtain possession of them, it would allow upon its claim the sum of sixteen hundred fifty dollars, $1,650.

Dated Hornellsville, N. Y., October 6, 1902.

JOHN GRIFFIN,
Attorney for Berlin Machine Works, Claimant.

FRANK H. ROBINSON,
Attorney for Trustee and Petitioner.

7

Exhibits.

"A." Proof of Claim and Petition of Claimant, verified May 31, 1901.

"B." Opinion of H. McMaster, Referee.

"C." Findings of proceedings, facts and certificate by Referee with order for machines annexed, all other attached exhibits omitted.

"D." Opinion of John R. Hazel, U. S. District Judge.

"E." Decision and Order of U. S. District Judge.

8

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

IN THE MATTER OF CLARA E. KELLOGG, Bankrupt.	In Bankruptcy No. 448.

9

IN THE MATTER OF The Claim of the BERLIN MACHINE WORKS.

On reading and filing the stipulation of the parties by their attorneys in the above entitled matter and without prejudice to either party to require

more of the record printed if the materiality thereof hereafter appears;

Ordered that the following papers from the record be omitted in printing, viz.: Notice to creditors, dated April 24th, 1901; Deed, Kellogg to Kellogg Co., dated January 29th, 1901; Petition of Hewitt, April 22nd, 1901, and Proof of Service, Summons and Complaint in action of Hewit to Kellogg, two deeds, Kellogg Co. to Hewit, Trustee, dated April 2nd, 1901, and the testimony, and that the petition of the Berlin Machine Works to the Referee be added and that the summary and papers as stipulated by said attorneys, together with the said stipulation and this order be printed by the Clerk in lieu of papers certified by the District Clerk.

Dated October , 1902.

E. HENRY LACOMBE,
U. S. C. J.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

IN THE MATTER OF CLARA E. KELLOGG, A Bankrupt.	In Bankruptcy No. 448.

TO HON JOHN R. HAZEL, UNITED STATES DISTRICT JUDGE:

The petition of Loren M. Hewit, as trustee in bankruptcy of Clara E. Kellogg, a bankrupt, respectfully shows:

That on the 3d day of July, 1901, the Berlin Ma- 13
chine Works filed a petition for review of the order granted by the Hon. Humphrey McMaster, Referee in Bankruptcy, upon the claim of the Berlin Machine Works, to recover specific property or its value, claiming to be the owner thereof. That thereafter the said Referee filed with said Court his certificate and return, and the matter was submitted to the United States District Court, and such proceedings were thereafter had that on the 22d day of December, 1901, an order was made reversing the decision of the Referee and adjudging that the Berlin Machine Works had a good and valid title to the said machines, and that the same be delivered to the said Berlin Machine Works or in case of sale thereof by 14
the said trustee, that the said trustee pay to the Berlin Machine Works or its attorney the sum of $1,200, the value of the said machines.

That an opinion was written by Judge Hazel covering all of the facts (which were undisputed). The certificate only of the Referee in Bankruptcy, together with the opinion of the United States District Judge, will be all that is necessary for a full and complete review in this matter.

The following errors are claimed to have been made by the District Judge in determining the questions involved, viz.:

FIRST.—It was error for the Court to hold "that 15
the title of the claimant, Machine Company, is unaffected as to the creditors of the bankrupt by its failure to record its contract with the bankrupt."

SECOND.—It was error for the Court to decide "that its, Machine Company, title is therefore good as against the trustee under a reasonable construction of Section 70 and Section 67."

THIRD.—It was error for the Court to determine "that the order of the Referee is reversed, and di-

16 recting the trustee to turn over the machines to the Berlin Machine Works, or in the event that they have been disposed of the trustee turn over to the company the sum of $1,200."

FOURTH.—It was error for the Court to make the order appealed from herein, and each and every part thereof.

FIFTH.—The Court should have decided that under Section 70, Subdivision 5, of the bankrupt law, that the trustee of the estate of the bankrupt was vested by operation of law with the title which the bankrupt "could by any means have transferred."
17

SIXTH.—The Court should have determined the purpose and meaning of these words in subdivision 5 of Section 70 of the Bankruptcy Law "could by any means have transferred," and adjudged that the trustee in bankruptcy acquired the title and became the owner of said machines, because the bankrupt could have transferred them under the laws of the State of New York, to a "purchaser, pledgee or mortgagee in good faith."

SEVENTH.—The decision of the said Court nullifies, eliminates and is contrary to the plain language of Subdivision 5 of Section 70 of the Bankruptcy Act.
18

Wherefore, the petitioner herein hereby makes application for and gives notice of application to superintend and revise and review in matter of law the said proceedings in the United States District Court, and hereby appeals to the Circuit Court of Appeals for the Second Circuit of the United States from the order made by the United States District Court for the Western District of New York, granted and entered on the 22d day of December, 1901, in favor of the Berlin Machine Works and

against the said petitioner and the estate repre- 19
sented by him.

Dated December 22, 1901.

LOREN M. HEWIT,
As Trustee, &c.
FRANK H. ROBINSON,
Attorney for Trustee.
Office and P. O. address,
107 Main street,
Hornellsville, N. Y.

UNITED STATES DISTRICT COURT,
Western District of New York,
Erie County, } ss.:

LOREN M. HEWIT, being duly sworn, says: That 20
he is the petitioner in the above entitled proceedings; that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is true.

LOREN M. HEWIT.

Subscribed and sworn to before me this 23d day of December, 1901.

GEO. P. KEATING,
[SEAL.] Notary Public,
Erie Co., N. Y.

UNITED STATES DISTRICT COURT,
Western District of New York.

On reading and filing the foregoing petition it is 21
hereby ordered that a superintendency and revision and review in matter of law and an appeal be and the same hereby is allowed in the above entitled proceedings to the Circuit Court of Appeals, Second Circuit of the United States, in pursuance of the laws, rules and practice from the order of the United States District Court made on the 22d day of December, 1901, in the matter of the claim of the Berlin Machine Works against Loren M. Hewit as trustee of Clara E. Kellogg, a bankrupt in the above entitled bankruptcy proceedings.

Dated December 22, 1901.

JOHN R. HAZEL,
U. S. J.

22 UNITED STATES DISTRICT COURT,

WESTERN DISTRICT NEW YORK.

In re CLARA E. KELLOGG, A bankrupt.	Affidavit of Service.

STATE OF NEW YORK, }
County of Steuben, } ss.:

23 C. E. DAVENPORT, being duly sworn, says: That she is over the age of twenty-one years, and resides at Hornellsville, N. Y.; that on the 26th day of December, 1901, at the office of John Griffin in City of Hornellsville, N. Y., she personally served the within petition, appeal and order on John Griffin, the attorney for the Berlin Machine Works, by personally delivering to and leaving with him true copies of the same.

She further says that she knew the person served as aforesaid to be such attorney in this action.

C. E. DAVENPORT.

Sworn to before me this 26th }
day of December, 1901. }

24 F. J. NELSON,
Notary Public.

(Endorsed)—Original.—U. S. Dist. Court, Western Dist. N. Y.—*In re* Clara E. Kellogg, a bankrupt.—Petition & allowance of Review, etc.—Claim of Berlin Machine Works.—Frank H. Robinson, Attorney for Trustee, 107 Main St., Hornellsville, N. Y.—United States Circuit Court of Appeals, Second Circuit.—Filed Dec. 28, 1901.—William Parkin, Clerk.

"A."

In the

DISTRICT COURT OF THE UNITED STATES

For the Western District of New York.

In the Matter of Clara E. Kellogg, Bankrupt.	In Bankruptcy. No. 448.

In the Matter of The Claim of The Berlin Machine Works against Loren M. Hewit, as Trustee of the estate of Clara E. Kellogg, Bankrupt.	

To the Hon. Humphrey McMaster, Referee in Bankruptcy:

The petition of the Berlin Machine Works respectfully shows—

That during all the times hereinafter mentioned the Berlin Machine Works was and now is a domes-

tic corporation duly organized and existing under and by virtue of the laws of the State of New York.

That heretofore, and on or about the 1st day of March, 1901, Clara E. Kellogg was adjudged a bankrupt by the District Court of the United States for the Western District of New York, sitting as a court of bankruptcy.

That heretofore, and on or about the 22d day of March, 1901, Loren M. Hewit was duly appointed trustee of the estate of Clara E. Kellogg, bankrupt, and duly qualified and entered upon the discharge of his duties as such trustee, and took possession of the property of the estate of the said bankrupt, and also the machines hereinafter mentioned.

That heretofore and prior to such adjudication, and prior to the filing of any petition for such adjudication, and on the 10th day of October, 1900, the said Clara E. Kellogg entered into a contract with the Berlin Machine Works for the purchase of the machines hereinafter mentioned.

That said contract was duly approved and accepted by the Berlin Machine Works at its main office, Beloit, Wisconsin, on October 19, 1900, in accordance with the terms thereof.

That in and by said contract said Clara E. Kellogg promised and agreed to pay to the Berlin Machine Works the sum of eighteen hundred fifty dollars ($1,850) for the following described machines:

One No. 114 15-inch 4-head inside moulder, and
One No. 114 12-inch 4-head inside moulder.

That in and by said contract it was further agreed and stipulated that the title and right to possession in and to said machines remained in the said Berlin Machine Works until the same was fully paid for in cash.

That after the making of said contract, and after the acceptance and approval thereof and before the filing of any petition in bankruptcy by or against

said Clara E. Kellogg said machines were duly de- 31
livered to and received by said Clara E. Kellogg.

That no judgment has been recovered for such purchase price or any part thereof, and no notes have been received therefor except such notes as are mentioned in the contract, and a renewal note of one of them. That in and by said notes it was stipulated that the title and right to possession in and to said machines remained in the said Berlin Machine Works until the same were fully paid for.

That no part of said sum of eighteen hundred fifty dollars ($1,850) has been paid.

That a fac-simile of the above mentioned contract was delivered to the said Clara E. Kellogg at the time of the execution thereof. That a copy of said 32
contract was duly filed in the Town Clerk's office of the Town of Canisteo, New York, on May 16, 1901. That said Clara E. Kellogg at the time of the execu tion of said contract resided in said Town of Canisteo, New York, ever since has resided and still does reside in said town.

That on or about the 14th day of May, 1901, a demand for said machines was duly made of said Loren M. Hewit, the trustee as aforesaid, for and on behalf of the said Berlin Machine Works. That on the 21st day of May, 1901, a written demand for said machines was duly served on said Loren M. Hewit, the trustee as aforesaid, for and on behalf of the Berlin Machine Works. That at each of said times 33
said Hewit refused to deliver up the possession of said machines and still refuses and neglects so to do.

That the present value of said machines is the sum of sixteen hundred fifty dollars ($1,650).

Your petitioner is informed and believes that no purchaser, pledgee or mortgagee in good faith subsequently to October 10, 1900, has acquired any right, title and interest in and to said machines.

Wherefore, your petitioner prays that the Berlin Machine Works be declared to be the owner of the said machines and that possession thereof be awarded to the said Berlin Machine Works, and

that an order to that effect be granted and that said order direct the said Loren M. Hewit, as trustee of the said estate, to deliver possession of said machines to the said Berlin Machine Works. That the machines be exempted from sale by the said trustee and that any order for the sale of the assets of said bankrupt be amended or vacated so as to exclude the same from sale, and that your petitioner have such other, further or different relief or order as to the Court shall seem just and proper, or if above relief is refused that it be determined that your petitioner has a valid lien upon said machines and is a secured creditor of said estate and is entitled to be first paid out of the proceeds of the sale of said machines and the amount of such proceeds be credited upon the claim of your petitioner, and that a dividend be paid on the unpaid balance of your petitioner's claim and that an order may be made to that effect.

BERLIN MACHINE WORKS,
By L. D. FORBES,
Secy. and Treas.

STATE OF NEW YORK, }
County of Steuben, } ss.:
City of Hornellsville, }

L. D. FORBES, being duly sworn, deposes and says: That he is the Secretary and Treasurer of your petitioner, mentioned in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

L. D. FORBES.

Sworn to before me this }
31st day of May, 1901. }

CLYDE E. SHULTS,
Notary Public.

"B." 37

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

IN THE MATTER OF CLARA E. KELLOGG, Bankrupt.	In Bankruptcy, No. 448.

38

Application of the Berlin Machine Works for the return of machinery sold to bankrupt, and claimed by applicant under the Conditional Sales Act of the State of New York.

JOHN GRIFFIN and Mr. HARRINGTON, for Applicant.
F. H. ROBINSON, for Trustee, and
DE MERVILLE PAGE, MILO M. ACKER, Creditors.
HUMPHREY MCMASTERS, Referee.

The bankrupt was adjudged to be such March 1, 1901. The trustee was chosen by creditors March 39
22, 1901. The Berlin Machine Works sold and delivered to the bankrupt two moulders under the following circumstances: The bankrupt was the owner of and operating a sash and blind plant in Canisteo, N. Y., and on October 10, 1900, signed an order for the machinery, the price of which was $1,850. The order was also signed by the salesman. It contained a description of the machinery, the terms of payment, and, among other conditions, one to the effect that title to the property should remain in the consignor until fully paid for in cash. This instrument was received October 12th and accepted by the Ber-

lin Machine Works October 19, 1900, such acceptance being signed "Berlin Machine Works by (printed) Osborn," in pencil. The order required his signature or that of some other authority before the same was accepted. At the time the order was signed by Miss Kellogg and the salesman a letter press copy was taken in her letter book and left with her. May 16, 1901, a copy of this order was filed in the Canisteo Town Clerk's office. It was a copy except in this particular. The instrument filed bore on its face the acceptance of the company. The letter press impression did not have such acceptance.

Upon this state of facts the Berlin Company assert title to the property and demand its surrender.

The conditional sales law of the State of New York requires that a "true copy" of the contract be filed with the Town Clerk, or, in certain cases, of which this is one, the contract be executed in duplicate and one duplicate delivered to the purchaser, otherwise the contract is void as to "subsequent purchasers, pledgees or mortgagees in good faith." That the applicant has complied with neither of these conditions seems clear, and it is found.

Aside from the fact that a letter press copy is not a duplicate, the copy left with Miss Kellogg was not the completed contract.

In Grant *vs.* Griffith, 39 App. Div., 109, Judge Merwin says: "An execution in duplicate means that there must be two originals of the same tenor. Ordinarily a contract is executed in duplicate, so that each party may have an original in his possession. A copy is not a duplicate. The statute in question necessarily called for a written instrument, and the purpose of the act required that a duplicate to be held by the purchaser should be signed by the *seller*." In the present instance such signature was wanting. It appeared only in the document filed with the Town Clerk six months afterwards.

The subsequent filing of the contract was too remote from the sale or delivery of the machines to

bring the vendor within the statute. The lien law as to filing chattel mortgages is similar to that of conditional sales, and I think authorities bearing upon the question of the time of filing chattel mortgages are applicable to the case at issue. 43

In Karst *vs.* Gane, 136 N. Y., 316, it was held that a delay of six weeks was fatal and not a compliance with the act; and where delay has been long enough to render the transaction void, subsequent filing will not cure the defect.

Krouse *v.* Schoolcraft, 51 App. Div., 160.

Stephens *v.* Perine, 148 N. Y., 476.

The conclusion must be that applicant failed to restore his status under the conditional sales law by the filing on May 16th. 44

But, relying on the fact that the law is operative only against subsequent purchaser, pledgees and mortgagees, in good faith, it is argued on the part of the Berlin Company that the Trustee in Bankruptcy does not come within this category, and has no standing as against the company.

I might agree with this contention were it not for Section 70 *a* of the Bankruptcy Act. Stating what property passes to the trustee, the section includes, "property which, prior to the filing of the petition, he (the bankrupt) could by any means have transferred, or which might have been levied upon and sold under judicial process against him." Under this section the trustee not only succeeds to all right of the bankrupt in the property, but also takes every right a purchaser in good faith or an execution creditor could have obtained from the creditor. 45

In Re Yukon Woolen Co., 2 Am. B. R., 805, it was held that a conditional bill of sale not being valid as against execution creditors in Connecticut, unless recorded, the property passed to the trustee. In other words, the trustee took title under 70 *a* because it was property "which might have been

46 levied upon and sold under judicial process against him." Property which the bankrupt "could by any means have transferred," must meet the same fate.

If the conclusion is correct that the Berlin Machine Work had failed to comply with the conditional sales law of the State of New York, and Miss Kellogg had not transferred the same, the property in dispute could have been transferred by the bankrupt, prior to the filing of the petition in bankruptcy, and the title to the same would have vested in the trustee. But the bankrupt did transfer the plant, of which the machines in controversy were a part, January 29, 1901, to the C. E. Kellogg Company. Since then has oc-
47 curred the adjudication in bankruptcy, the transfer by the C. E. Kellogg Company to the trustee April 2, 1901, and all this prior to the filing of a copy of its contract of sale by the Berlin Company with the Town Clerk,

Even if the transfer to the Kellogg Company *were* a fraud upon creditors, the property has come back to their representatives by the company's voluntary act, the applicant here has neither lost nor gained any rights in the meantime, and the trustee has succeeded to the title as if he were a purchaser in good faith.

In view of the foregoing, it is unnecessary to discuss the other points referred to in the very able
48 and interesting briefs of the respective counsel. The law and the facts, in my judgment, admit of no other conclusion than that the applicant has lost the legal title to the machinery, and must come in as an unsecured creditor.

It is ordered.

Dated Bath, N. Y., June 22, 1901.

HUMPHREY MCMASTER,
Referee in Bankruptcy.

49

"C."

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK.

IN THE MATTER OF CLARA E. KELLOGG, Bankrupt.	In Bankruptcy. No. 448.

50

IN THE MATTER OF The Claim of THE BERLIN MACHINE WORKS AGAINST LOREN M. HEWITT, as Trustee of the estate of Clara E. Kellogg, Bankrupt.	

51

I, HUMPHREY MCMASTER, Referee of the Steuben-Livingston County District of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the question herein stated arose pertinent in the proceedings, and the following is a summary of the evidence relating thereto, viz.:

The bankrupt was duly adjudged to be such March 1, 1901, and on the same day Loren M. Hewitt was

52 appointed temporary Receiver and took possession of the property of the bankrupt estate. Loren M. Hewitt was chosen as trustee by the creditors March 22, 1901, and duly qualified and entered upon the discharge of his duties as such trustee and continued in possession of the property of the estate of the said bankrupt and also the machines hereinafter mentioned.

The Berlin Machine Works sold and delivered to the bankrupt two wood working machines under the following circumstances:

The bankrupt was the owner of and operating a sash and blind plant in Canisteo, N. Y., and on October 10, 1900, signed an order for the machinery,
53 which order is hereto annexed and marked "Exhibit 2." The order was also signed by the salesman, John J. Canavan, but the words at the bottom of the order, "Oct. 19, 1900," and "Osborn" were not upon the order at that time. The order was received by the Berlin Machine Works at its main office in Beloit, Wisconsin, October 12, 1900, and on October 19, 1900, the words, "October 19, 1900," and "Osborn" were placed upon it by O. B. Osborn, who has the authority from the Berlin Machine Works to accept of and approve orders.

At the time the order was signed by Miss Kellogg and the salesman a letter press copy was taken in her letter book and left with her. At the time the
54 order was signed, and at the time it was approved at the main office, the machines mentioned in the order were not manufactured. One machine was shipped from Beloit, Wis., on October 29, 1900, and the other was shipped from said place on November 16, 1900. Within a few days after shipment each machine was received by Miss Kellogg at Canisteo, N. Y., and were placed in her plant and set in operation.

On October 29, 1900, the said Clara E. Kellogg signed and delivered to the said Berlin Machine Works, a note of which the following is a copy:

CANISTEO, N. Y., Oct. 29, 1900. 55

$925.00.

Four months after date, for value received, I, we, or either of us, promise to pay the Berlin Machine Works or order, at the First State Bank, Nine Hundred and twenty-five Dollars, with exchange.

Title and right of possession of the property for which this note is given remains in the Berlin Machine Works until fully paid for.

C. E. KELLOGG.

(Two 10c. Revenue Stamps.)
(Across face cancelled "10/29/00.")

That upon the 16th day of November, 1900, said Clara E. Kellogg duly signed and delivered to the Berlin Machine Works a note of which the following is a copy: 56

CANISTEO, N. Y., Nov. 16, 1900.

$925.00.

Two months after date, for value received, I, we, or either of us, promise to pay to the Berlin Machine Works, or order, at Nine hundred Twenty-five Dollars, with exchange, with interest at the rate of six per cent. per annum from date until paid.

Title and right of possession of the property for which this note is given remains in the Berlin Machine Works until fully paid. 57

C. E. KELLOGG.

(Two 10c. Revenue Stamps.)
(Cancelled.)

That said notes were respectively given for the machines respectively delivered upon said respective dates. That neither of said notes or any part thereof has been paid. That no part of the consideration for either of said machines has been paid, and the amount agreed to be paid for each of said machines is still due and payable, with interest thereon. That each of said machines is now in the

58 possession of the said trustee of the estate of Clara E. Kellogg, bankrupt.

That at the time of entering into said contract for the purchase of said machines, said Clara E. Kellogg resided in the Town of Canisteo, N. Y., and has ever since so resided.

That upon the 16th day of May, 1901, a copy of said order and the acceptance and approval thereof was filed with the Town Clerk of the Town of Canisteo, N. Y.

That the Berlin Machine Works demanded said machines of the said trustee and he refused to deliver the same to the said machine works, or to permit them to obtain the same.

59 (Evidence, p. 437.) And upon the 4th day of May, 1901, he notified said Berlin Machine Works by letter that he could not recognize the title of said machine works to the said machinery. That upon the 19th day of October, 1900, the Berlin Machine Works mailed a letter, of which the following is a copy, to C. E. Kellogg:

" BELOIT, Wis., 10/29/00 A. M.

C. E. KELLOGG,
Canisteo, N. Y.

DEAR SIR:

Your order of the 10th inst. given our Mr. Canavan, for two inside moulders, duly received, for
60 which please accept our thanks. We are at work on these machines and expect to make shipment at an early date.

Yours very respectfully,
THE BERLIN MACHINE WORKS,
By O. B. OSBORN."

That the said letter was duly received by said Clara E. Kellogg.

That said machines could be removed from the building in which they were without any injury to the said building, and were attached to the floor of

the building in which they were located by screws (Evidence, p. 463). 61

That the said Berlin Machine Works were duly incorporated under the laws of the State of New York.

That said Hewit, while Receiver as well as while trustee, upon an order of this Court borrowed money, and that the said Loren M. Hewit, as trustee, upon an order of the Referee, borrowed the sum of three thousand five hundred dollars ($3,500). That there are sufficient funds and accounts absolutely good in his hands to pay the same, over and above funds upon which no lien is claimed (Evidence, pp. 476 and 459).

That upon the 24th day of April, 1901, a notice to the creditors of the above named bankrupt, was made by me and mailed to the various creditors, a copy of which is hereto attached. 62

That upon the 14th day of May, 1901, the Berlin Machine Works filed a petition with the Referee, a copy of which is attached to petition for review, and marked "Exhibit D."

That on the 29th day of January, 1901, the said Clara E. Kellogg, executed a deed to the C. E. Kellogg Company, a body corporate of the State of Delaware, of the real property of the said Clara E. Kellogg; copy of said deed is hereto annexed and marked "Exhibit 11." That the consideration expressed in said deed was one dollar ($1) and other valuable consideration. That the one dollar consideration therein, was never paid. 63

That said Clara E. Kellogg was secretary and treasurer of said corporation, and that none of the other stockholders gave value for their stock except in service. That said Clara E. Kellogg received all but twenty shares of the two hundred shares of the stock of said corporation in consideration of said deed and property heretofore mentioned and that she gave no other value therefor (Evidence, p. 485).

That at the time of forming said corporation and making said deed to the said corporation, the said

64 Clara E. Kellogg was insolvent, and the said Clara E. Kellogg was crowded by her creditors and said corporation was formed and said deed made solely for the purpose of obtaining longer time and hindering and delaying creditors, and getting the property where it could not be reached by executions against the said Clara E. Kellogg, and the directors knew of such a purpose and received the deed with like purpose (Evidence, pp. 487 and 491).

That after the said Loren M. Hewit was appointed trustee of the estate of said Clara E. Kellogg, bankrupt, he, as such trustee, commenced an action in the Supreme Court against the said Clara E. Kellogg Company, for the purpose of setting aside all trans-
65 fers made by the said Clara E. Kellogg to the said Clara E. Kellogg Company, on the ground that the said transfer was made with the intent to hinder, delay and defraud creditors of the said Clara E. Kellogg. That the said summons and complaint in said action is hereto attached and marked "Exhibit E."

That before the commencement of the said action, the said trustee demanded of the said Clara E. Kellogg Company, a reconveyance to the said Loren M. Hewit, as trustee of all of the said property theretofore conveyed and transferred by the said Clara E. Kellogg to the C. E. Kellogg Company.

That after the commencement of said action,
66 there was a meeting of all the stockholders of the said C. E. Kellogg Company, and at said meeting there was unanimously passed a resolution, of which the following is a copy:

"WHEREAS, the stock issued to Clara E. Kellogg for the transfer to the C. E. Kellogg Company, of the personal and real property made the said Company about January 29th, 1901, has been returned to this Company and a demand made for a return and reconveyance of said property to Loren M. Hewit as trustee in bankruptcy of Clara E. Kellogg; and it is claimed that the sale to the said Company was null

and void and fraudulent as to the creditors of the 67
said Clara E. Kellogg; and an action having been
begun to have the same so declared; therefore, Be
it resolved, that the contracts made for the purchase
and sale of the stock and personal property, and the
deed of the real estate and all of the transactions in
relation thereto made by the said Clara E. Kellogg
to and by the said C. E Kellogg Company, be, and
the same are hereby rescinded; and that in evidence
thereof and to acquire title thereto, the president
and secretary be and they are hereby directed to
make reconveyance of the said personal property
and the lands to the said Loren M. Hewit as trustee
in bankruptcy of Clara E. Kellogg."

68

That upon the same day and held at the same time and place, to wit, Canisteo, Steuben County, N. Y., on the 11th day of April, 1901, there was a meeting of the trustees and directors of the said C. E. Kellogg Company, and at said meeting a resolution in all respects like the resolution passed by the stockholders, except where the words "Stockholders" appear, the words "trustees and directors" appear, was unanimously passed by said trustees and directors, all voting in favor of the resolution.

That in pursuance of said resolution and upon the socond day of April, 1901, the said C. E. Kellogg Company duly executed and delivered to the said Loren M. Hewit, as trustee in bankruptcy of Clara E. 69
Kellogg, a conveyance of the said property, which is hereto annexed and marked "Exhibit F." Said transfer was made upon the surrender and delivery to the C. E. Kellogg Company of all the capital stock of the company then held by the said Hewit, as trustee of Clara E. Kellogg, being the entire consideration for the transfer of the property to the company by C. E. Kellogg. At the time of the said transfer to the trustee it was claimed by the trustee that the property had been transferred to the said company by the said Clara E. Kellogg for the purpose of hindering, delaying and defrauding the

70 creditors of said Clara E. Kellogg. Said deed was made for the purpose of showing on the records of the Steuben County Clerk's office of the rescission of the conveyance to the C. E. Kellogg Company, and as a part of the transaction in relation thereto.

That an order was made by me herein, directing the sale of all the real property of the said Clara E. Kellogg, which was transferred to the said trustee in bankruptcy, and also the said machinery conditionally sold by said Berlin Machine Works to the said Clara E. Kellogg, free and clear from all incumbrances; which also ordered, adjudged and decided that the said Loren M. Hewitt, as trustee of said Clara E. Kellogg, bankrupt, had succeeded to the
71 title of the above mentioned machinery (being the moulders mentioned and described as having been ordered by the said Clara E. Kellogg from the said Berlin Machine Works), as a purchaser in good faith, and that the Berlin Machine Works had parted with the title to said machinery and had no lien thereon, and no interest therein, and that their debt was not secured, and that they must come in to the distribution of the said estate as unsecured creditors.

That the said trustee upon receiving said deed from the C. E. Kellogg Company, delivered the stock of the said C. E. Kellogg Company to the said C. E. Kellogg Company.

That I have an order directing the sale of said
72 machinery and the real property in which the same is, to be made together, and free and clear from all incumbrances so as to give clear title of said property to the purchaser.

That the schedule filed by the bankrupt stated that the Berlin Machine Works' claim was a secured claim.

That the person of whom the trustee borrowed money, neither filed nor made objection to allowing the claim of the Berlin Machine Works as a secured claim.

The trustee testified that the present value of the

said machines is $1,200, and Mr. Canavan, the sales- 73
man, testified that the present value is $1,650.

That the questions which are certified to the Judge for his opinion thereon are whether said Loren M. Hewit, as trustee in bankruptcy of the estate of said Clara E. Kellogg, holds title to said machinery free and clear from any claims or right of the Berlin Machine Works, and the said Berlin Machine Works comes in as an unsecured creditor, only; or whether said Berlin Machine Works is the owner of the said property or has a lien thereon and is entitled to the possession thereof. And whether it was error to admit evidence of the conversation had by the trustee with the person of whom he borrowed the money, as set forth on pages 449, 450 and 451 of the evidence; 74
and to receive the evidence over objection and exception, as to the trustee not knowing that the Berlin Machine Works made any claim to the machines, as appears in evidence, page 454.

I also return herewith all the evidence given herein, and the petition for sale made herein. Also hereto annexed is the opinion herein.

"Exhibit No. 2."

CANISTEO, N. Y., October 10, 1900.

BERLIN MACHINE WORKS.

—Sales Offices— 75

Main Office and Works, Beloit, Wisconsin. New York, Chicago, San Francisco.

Subject to strikes, accidents or other delays beyond our control, please ship in good order the following Machinery, delivered F. O. B., Beloit, Wisconsin, about as soon as possible, 190–.

One #114—15 inch 4 head Inside Moulder
One #114 –12 inch 4 head Inside Moulder

For which I agree to pay within 4 months after date of Shipment Eighteen Hundred & Fifty (1850 no/100) Dollars with exchange.

76 The purchaser agrees to make settlement within thirty days after date of shipment, and to then evidence all payments due at a later date, by notes bearing date of shipment and interest.

In case payment is divided, to be made as follows:
$925. In note at 2 months without interest
$925. " " " " " " "

It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash, and that in case of rejection consignee will promptly return it to consignor F. O. B. at Beloit, Wis., and that this contract is not modified or added to by any agreement not expressly stated
77 herein, and that a retention of the property forwarded after 60 days from date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of the Berlin Machine Works.

C. E. KELLOGG.

SHIP VIA ERIE R. RD.
Accepted by
John J. Canavan
Salesman for
BERLIN MACHINE WORKS,
78 Subject to approval at the main office.
Beloit, Wisconsin.

Received and accepted
Beloit, Wis., Oct. 19, 1900
BERLIN MACHINE WORKS In presence of
by OSBORN
Printed in Transfer Ink.

"D."

79

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK.

IN THE MATTER OF CLARA E. KELLOGG, A Bankrupt.	In Bankruptcy. No. 448.

80

FRANK H. ROBINSON, for Trustee.
MILO M. ACKER, for various creditors.
ROMER & HARRINGTON, for The Berlin Machine Works; JOHN GRIFFIN of Counsel.
DE MERVILLE PAGE, for various creditors.

HAZEL, *J.:*

This is a review of a ruling by a referee, holding that the title to certain machinery vested in the trustee in bankruptcy herein as against The Berlin Machine Works, the appellant on this review.

81

The facts which are necessary to be examined for the proper decision of the question under review, are undisputed. On her voluntary petition, the bankrupt was adjudicated as such on the 1st day of March, 1901. A trustee was selected on the 22d day of March, 1901. He thereafter duly qualified, entered upon the performance of his duties and still continues to act as such trustee. The bankrupt conducted a planing mill at Canisteo. On October 10, 1900, the bankrupt entered into a contract with The Berlin Machine Works for the purchase of two molders. The transaction was had with a salesman

82 of the Machine Company. The price agreed upon was $1,850. An order for the machinery was signed by the bankrupt. This was countersigned by the salesman for the Machine Company. The order which constituted the contract between the parties, provided, that payment should be made within four months from the date of shipment of the goods in question. The contract further provided that the title to the property described therein which is the machinery in question, should remain in the Machine Company until fully paid for. The order signed by Clara E. Kellogg was sent to the main office of the Company, a letter press copy being kept by the bankrupt. The
83 order received by the Company was accepted. The machines mentioned and described therein were shipped to the bankrupt October 29th and November 16th, respectively. They were in due course and within a few days received by the bankrupt, set up in her planing mill and put in operation. On October 29th and November 16th, the bankrupt delivered to the Machine Company two promissory notes for $925 dollars each, payable in two and four months from their respective dates. These notes were given in payment for the machinery in question. The notes were made to the order of the Berlin Machine Works, and contained the following clause. "Title and right of possession of
84 the property for which this note is given remains in The Berlin Machine Works until fully paid for." They were mentioned in the schedules as secured claims, the security being the machinery in question. These notes have not been paid. The Machine Company does not file a claim for the indebtedness represented by these notes but seeks possession of the property to which they assert title or its value. The planing mill and machinery were thereafter transferred by Clara E. Kellogg to the C. E. Kellogg Company. The transfer was thereafter attacked, as fraudulent and without consideration, by the trustee, and the entire property was reconveyed to him

by a voluntary transfer. There is no substantial claim made that those conveyances vest the trustee with any different or better title to the property in question than if the title had simply vested in him by operation of law. This phase of the question can, therefore be eliminated from the discussion. As can also the question of whether by its erection in the mill, the machinery became part of the realty. 85

The controversy is as to the title of the trustee as against the claim of title asserted by the vendor of the machinery. There is no question but that at common law, the title remained in the vendor as against all persons. No title whatever could be conveyed by the conditional vendee (Ballard *v.* Burgett, 40 N. Y., 314; Graves Elevator Co. *v.* Callahan, 11 App. Div., 301). Any rights of the vendee or third parties contrary to this rule of common law must be found in statutory enactment. The statute of the State of New York applicable to this case and in force when the machinery was sold, is found in the lien law of 1897, Chapter 418, Sec. 112. 86

> "Conditions and reservations in contracts for sale of goods and chattels.—Except as otherwise provided in this article, all conditions and resrvations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendee or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency shall be void as against subsequent purchasers, pledgees or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article." 87

88 The claimant Machine Company, did not comply with this statute prior to the date when all the property of the bankrupt vested in the trustee. It must still be held, however, that unless the trustee in bankruptcy can be regarded as a purchaser, pledgee or mortgagee in good faith, he would not take title as against the vendor. He certainly cannot be classed as such. His only claim to a higher title than the bankrupt as against the Machine Company must rest, therefore, upon some provision of the Bankruptcy Act. This is the opinion of the Referee, who says:

> " Relying on the fact that the (State) law
89 is operative only against subsequent purchasers, pledgees and mortgagees in good faith, it is argued on the part of the Berlin Company that the Trustee in Bankruptcy does not come within this category, and has no standing as against the Company. I might agree with this contention were it not for Section 70 of the Bankruptcy Act."

This section or so much of it as applies to the case at bar reads as follows:

> " The trustee of the estate of a bankrupt upon his appointment and qualification, shall be vested by operation of law with the title of
90 the bankrupt, to all (5) property which, prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Counsel for trustee claims that by reason of this section the trustee acquired a greater title than the bankrupt himself had, to wit, a perfect title, which the bankrupt under the present state of facts might have transferred prior to the filing of the petition. That the trustee acquires not the title of the bankrupt to all his property, but the title which he might

have conveyed. The most reasonable construction 91
would seem to be that this section simply vests in the trustee the title which the bankrupt had to the property described in the section. It cannot be construed to grant to the trustee a higher title than was in the bankrupt at the time the property passed by operation of law to the trustee. The interest of the creditor in this property is affected by no other section of the bankruptcy statute and his claim must stand or fall upon its proper construction. This view has recently been upheld by the Circuit Court of Appeals for this circuit. *In re* N. Y. Economical Printing Company, 110 Fed., 514, the Court said:

> "The Bankruptcy Act does not vest the 92
> trustee with any better right of title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act which is fraudulent as to creditors or in invalid as to creditors for want of record, it is invalid as to the trustee."

The case of the Chattanooga Nat. Bk. *v.* Rome 93
Iron Co., 102 Fed., 755, seems directly applicable to the case at bar. In that case the Court directly holds that except in cases affected by fraud or illegal preference, a trustee in bankruptcy under the Act of 1898, takes only the interest of the bankrupt in the assets of the estate and holds such assets subject to the valid claim, liens and equities enforceable as against the bankrupt. There is no claim of fraud or illegal preference before the Court in this case. The debt represented by the contract for the machine is set forth in the bankrupt's schedules as one secured by the ma-

94 chinery. The attorney for the trustee endeavors to distinguish the cases applicable to the question under discussion decided under the Act of 1867, and which were cited upon the argument favorable to the contention of the creditor. The Chattanooga case, *supra*, says upon this point, quoting Section 70*a* of the Act of 1898, and Revised Statute, Section 5046, which is the section applicable under the Act of 1867:

> "I am unable to see how any distinction can be drawn favorable to the contention of counsel for the trustee between the two acts. The purpose of both acts, although different language is used, seems to be to vest in the
95 trustee the title to the entire estate of the bankrupt; and no distinction can be perceived which justifies the inference that under the last act the trustee takes the property of the bankrupt as an innocent purchaser, without notice, and that in the former he did not."

The cases under the Act of 1867 seemed all to agree that no title would pass to the trustee superior to that of the bankrupt in a similar case where the title to property under a conditional sale is governed by similar statutes.

In the case of Casey *v.* Cavaroc, 96 U. S., 467, the Court says:

96 "Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor, because the assignee only takes such title as the debtor has at the time of the assignment or insolvency."

See also

Casey *v.* La Societe de Credit Mobilier, Fed. Cas., 2496.

In re Lyon, Fed. Cas., 8644.

The case of *In re* Tatem, 6 A. B. R., 426, cited by 97
counsel for trustee, was decided in North Carolina. In that State the local law provides that a contract for a conditional sale of personal property in which the title is retained by the bargainor must be registered in the same manner and with the same legal effect as is provided for chattel mortgages. The question, therefore, presents in that case a different aspect than here, where a different rule is made by State legislation for conditional sales and chattel mortgages. Thus, in that case, contract of conditional sale of the goods in question, unrecorded, was held void as against creditors—the same as a chattel mortgage. Such is not the law in the State of New York, as has already been seen in the statute quoted. 98
In re Booth, 98 Fed., 975, relied upon by counsel for the trustee, is not analogous. That case was decided under Section 67*a* of the Bankrupt Act. The Court says, page 976:

> "The Bankruptcy Act provides that claims which for want of record or other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate."

In that case a chattel mortgage of which enforcement was sought as against the trustee was not filed. The Court held it void against creditors. *In re* Yukon Woolen Co., 2 A. B. R., 807, is a case 99
relied on by counsel for the trustee. It is true that Judge Townsend there said that by reason of Sec. 67 (*a*) and Sec. 70 (*a*), the trustee had greater right than the assignee under the Act of 1867. Nevertheless, that case was where the trustee claimed against a creditor who asserted title to certain property held by the bankrupt under a conditional sale agreement. This was not properly recorded. The Connecticut statute under which the rights of the creditors were to be determined as against any rights secured by law to the trustee, expressly provided that a conditional sale of property, not made in conformity

100 with the provisions requiring the contract to be in writing and to be recorded, shall not exempt such property from attachment and execution for the debts of the vendee.

The title of the claimant Machine Company, is unaffected as to the creditors of the bankrupt, by its failure to record its contract with the bankrupt. Its title is, therefore, good as against the trustee under a reasonable construction of Sec. 70 and Sec. 67. The property appears to have been sold, no payments have been made to apply on the contract for the machines. The order of the Referee is reversed and an order may be entered directing the trustee to turn over the machines to the Berlin Machine
101 Works, or in the event that they have been disposed of, the trustee may turn over to the company the sum of $1,200, which from the evidence taken before the Referee, appears to be their reasonable value.

"E."

At a Term of the District Court of the United States for the Western District of New York, held at the Court House in Buffalo, New York, on the 23d day of December, 1901.

Present—Hon. JOHN. R. HAZEL, *District Judge.*

102

IN THE MATTER OF CLARA E. KELLOGG, A Bankrupt.	In Bankruptcy No. 448.

Whereas, on the 3d day of July, 1901, The Berlin Machine Works filed a Petition for Review of the Order granted by Hon. Humphrey McMaster, Referee in Bankruptcy,

And whereas, said Referee in Bankruptcy did, on 103
the 19th day of August, 1901, file with this Court
his certificate and also his return,

And whereas, Notice of Argument was served herein on all the parties interested on the 9th day of September, 1901, and after hearing John Griffin, the attorney for the Berlin Machine Works, and Romer & Harrington, his counsel, and Frank H. Robinson, attorney for the Trustee in Bankruptcy, and Milo M. Acker and DeMerville Page, for various creditors, and after due consideration,

It is ordered and adjudged, that the Order of the Referee in Bankruptcy, Humphrey McMaster, adjudging that Loren M. Hewitt, as Trustee in Bankruptcy of the estate of Clara E. Kellogg, bankrupt, 104
holds two machines, to wit: One # 114—15 inch, 4 head, inside Moulder; and One # 114—12 inch, 4 head, inside Moulder, free and clear from all incumbrances; and that the Berlin Machine Works could not prove its claim as a secured creditor, and should come in as an unsecured creditor, only; and that the said Berlin Machine Works have no lien upon said property to the amount of the unpaid purchase money, is hereby reversed.

It is further ordered, that the said Berlin Machine Works has a good and valid title to said machines for the purpose of securing the purchase price thereof, to wit, eighteen hundred and fifty dollars ($1,850), with interest thereon from the 7th day of February, 105
1901, and has the right to the possession of said machinery, and the right to dispose of the same according to law; and that the said claim of the said Berlin Machine Works is proved as a secured claim; and that the said Loren M. Hewitt, as Trustee in Bankruptcy of the estate of the said Clara E. Kellogg, a bankrupt, deliver said machinery to the said Berlin Machine Works, or, in the event that said machinery had been sold prior to the filing of the opinion herein, before the rights of the said Berlin Machine Works in and to the said machinery are released, said Trustee pay over to the said Berlin Machine Works, or

its attorney, the sum of twelve hundred dollars ($1,200), which is hereby determined to be the value of said machines, before any other payment out of the proceeds of the sale of the real estate and the above mentioned machines is made, and when so paid the lien of the said Berlin Machine Works shall be deemed discharged, and it shall have a claim against said estate as an unsecured general creditor for the balance of the purchase price of said machinery.

If said machinery is sold, as aforesaid, and an appeal or appeals are taken from this order, the trustee shall pay into court twelve hundred dollars ($1,200), and one hundred dollars ($100), from which interest from date may be paid on said twelve hundred dollars ($1,200) of the proceeds of said real estate and machinery, pending said appeals to the Circuit Court of Appeals and to the Supreme Court of the United States, if leave is granted to go to said Supreme Court instead of paying the same as above directed, and if final decision is in favor of the Berlin Machine Works, said money shall be paid upon filing copy of said decision, and ten days' notice to the attorney for the said trustee.

JOHN R. HAZEL,
U. S. J.

United States Circuit Court of Appeals for the Second Circuit, October Term, 1902.

Submitted November 7, 1902; decided December 2, 1902.

In the Matter of CLARA E. KELLOGG, Bankrupt; LOREN M. HEWIT, Trustee, Petitioner. No. 15.

Petition to review order of the district court of the United States for the western district of New York.

Before Judges Lacombe, Townsend, and Coxe.

This cause comes here upon petition to review a decision of the district judge, western district of New York, sustaining the claim of the Berlin Machine Works to receive specific personal property, or its value, which property was in the possession of the bankrupt under a contract of sale, which specifically provided that title should not pass till payment for the same was made. No payment has been made.

Per Curiam: The facts are fully set forth in the opinion of the district judge, and there is no dispute about them. He has carefully discussed the propositions of law arising thereon and we concur in his reasoning and conclusions. It seems unnecessary, therefore, to file any additional opinion here, especially in view of the circumstance that the subject has recently been discussed by this court in *New York Economical Printing Company* (110 *F. R.* 514). It was held in that case that "the bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed." Inasmuch as by the New York statute a conditional sale, such as this, of property not delivered to the vendee for consumption or sale (*In re Garcewich*, 115 *F. R.* 87), is void only as against subsequent purchasers or pledgees or mortgagees in good faith, and not against creditors, the decision in the New York Economical Printing Company *supra* is controlling of the case at bar. Petitioner appreciates this fact and his argument is addressed to a re-argument of the questions settled in that case. We see no reason to change the opinion therein expressed, which was enunciated after a careful consideration of the bankrupt law. No authority conflicting with the views therein expressed is cited, for cases, in which by the State law conditional sales are void as against creditors, are not in conflict with such opinion.

The order of the district court is affirmed with costs.

Frank H. Robinson, for the petitioner.
John Griffin, opposed.

At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the Post Office building in the city of New York, on the 15th day of December one thousand nine hundred and two.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, circuit judges.

In the Matter of CLARA E. KELLOGG, Bankrupt; LOREN M. HEWIT, Trustee, Petitioner.

Petition to review order of the district court of the United States for the western district of New York.

This cause came on to be heard on the transcript of record from the district court of the United States, for the western district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

E. H. L.
W. K. T.
A. C. C.

Endorsed: United States circuit court of appeals, second circuit. *In re* Clara E. Kellogg, Loren M. Hewit, trustee, petitioner. Order for mandate. United States circuit court of appeals, second circuit, Filed Dec. 15, 1902. William Parkin, clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 40 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of *In re* Clara E. Kellogg, Loren M. Hewit, trustee, petitioner, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 31st day of January in the year of our Lord one thousand nine hundred and three and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[Endorsed:] I do hereby certify that in my opinion the determination of the question or questions involved in the allowance of the claim of the Berlin Machine Works described in the annexed certified record is essential to a uniform construction of the bankruptcy act of 1898 throughout the United States. Dated Feb'y 3, 1903. R. W. Peckham, asso. jus. Sup. Ct. U. S., Washington, D. C.

UNITED STATES OF AMERICA, ss:

To The Berlin Machine Works or John Griffin, its attorney of record in the court below, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the United States circuit court of appeals for the second circuit wherein Loren M. Hewit as trustee in bankruptcy of Clara E. Kellogg is appellant and The Berlin Machine Works is appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 3rd day of February, in the year of our Lord one thousand nine hundred and three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

On this 5th day of February, in the year of our Lord one thousand nine hundred and three, personally appeared Clyde E. Shults before me, the subscriber, a notary public in and for the county of Steuben, State of New York and makes oath that he delivered a true copy of the within citation to John Griffin at Hornellsville, New York on February 5th, 1903.

CLYDE E. SHULTS.

Sworn to and subscribed the 5th day of February, A. D. 1903.

L. A. BENTON,
Notary Public.

Endorsed on cover: File No. 18,852. U. S. circuit court appeals, 2d circuit. Term No. 228. Loren M. Hewit, as trustee in bankruptcy of Clara E. Kellogg, appellant, *vs.* The Berlin Machine Works. Filed March 2nd, 1903.

FILE COPY. 21149

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APR 15 1904
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES

228

LOREN M. HEWIT
As Trustee in Bankruptcy of
CLARA E. KELLOGG,
Appellant,
against
THE BERLIN MACHINE WORKS.

FRANK H. ROBINSON,
Att'y for Appellant
Horpellsville, N. Y.

Certified by Mr. Justice Peckham 39

STATEMENT.

The Trustee in Bankruptcy and creditors complain of the decision of the District Court for Western New York and of the United States Court of Appeals 2nd cir affirming the same. The mill property of which certain machinery claimed by the Berlin Machine Works was a part came into possession of an officer of this Court March 1, 1901, (Receiver in Bankruptcy) and later a Trustee, and became part of the assets to be sold and proceeds to be distributed. Petition was made by the Trustee to sell, and the Berlin Machine Works came in and filed proof of claim and a petition asking for the machinery, claiming to be owners by reason of reservation of title. The Trustee claimed it was a part of the real estate which had been ordered sold, because the Berlin Machine Works had not complied with the conditional sale law of the State of New York and title was vested in him, the Trustee, by operation of law.

The issues were tried before the Referee in Bankruptcy and decided in favor of the Trustee and creditors. (See opinion and decision, Fols. 37 to 48.)

The decision was reviewed by the District Court and reversed on the sole ground that the bankruptcy act of 1898 was in effect the same as the previous acts conveying to the Trustee no better title than that possessed by the bankrupt. (See opinion, Fols. 80 to 101.) Which decision was affirmed by the Circuit Court of Appeals, and the Trustee appeals to this Court.

Both the Referee and the District Court held that by reason of the vendor having failed to comply with the conditional sale law of the State of New York, the reservation of title was void and the sale absolute, providing the Trustee acquired the same title as a subsequent purchaser in good faith.

I.

Section 70. a---Bankruptcy Law of 1898.

A careful reading satisfies me that there is no such provision as Sec. 70. a-5 of act 1898 in either the act of 1841 (see Sec. 3) or the act of 1867 (see Sec. 14), but that the same is entirely new and for a purpose. It is generally conceded by the District and Circuit Courts that the same is new.

Youkon Woolen Co., 2 A. B. R. 805, 96 Fed. 326.
In re Tatem, Mann & Co., 6 A. B. R. 426, 110 Fed. 519.
In re Booth, 3 A. B. R. 574, 98 Fed. 975.
In re Garcewich, 8 A. B. R. 149, 115 Fed. 87.
In re Frazier, 9 A. B. R. 21, 117 Fed. 746.

I am aware that my discussion may not be in accord with the views of the Judge writing the opinion in the New York Economical Printing Company, 110 Fed. 514, (which decision is inconsistent with Garcewich case decided by same Court), but I know my contention will be carefully considered and an opinion writ-

ten, having in mind that the Congress passing the act of 1898 was composed of men from all states, some of which states had local assignment laws which clothed an assignee with the same rights and title for which we are here contending.

It is respectfully submitted that the statute itself in terms defeats the claim of The Berlin Machine Works. In the first place, the Bankrupt Act gives Trustee all the title of the bankrupt in all his property except that which is exempt; *also* Sec. 70—(1) to the documents relating to the property; also (4) property transferred by him in fraud of creditors; also (5) property which he could *by any means* have transferred, or which might have been levied upon and sold under judicial process against him.

The Fourth Circuit Court of Appeals in Chesapeake Shoe Co. vs. Seldner, 10 A. B. R. at page 470 contrary to opinion in Economical Printing Company case above referred to, holds that the "filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction." At pages 472 and 473 it reads "In the case at bar, the shoes could have been transferred by the bankrupt." "If the 'title of the bankrupt' in Section 70 A means title as between him and a consignor or vendor, this section of the Act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous." I hope the Court will read the whole of this able opinion.

The statute regulating conditional sales in the State of New York expressly provides that the vendee may convey title to the property to purchasers or mortgagees

in good faith. It is a short way of saying it, but Congress has covered and intended to cover this condition of affairs in the statute in sub-division 5 of the section cited. It is very broad, any property which he could convey "*by any means.*" If it had been intended to limit the rights of the Trustee to only the right of the bankrupt, both sub-divisions 4 and 5 were unnecessary; it is covered by the preceding language in the section, and it is apparent that sub-division 5 was aimed at conditional sales and intended to cover them, *no matter what the form of the local statute might be.* The latter part of the sub-division was intended to cover the case of unfiled chattel mortgages and the first part of the sub-division was entirely unnecessary unless it was intended to reach cases where the title of the bankrupt might be defective as between himself and some other person. That if he had any power of sale "by any means," then that property should be taken by the Trustee in Bankruptcy. One of the principal purposes of the Bankrupt Act was to preserve equality among creditors and to prevent priority. When this purpose is borne in mind, the effect to be given to the words "by any means" is rendered the more apparent. In construing a statute, an effect should be given to every word in it if possible. It is quite apparent that each of the sub-divisions in Sec. 70 were intended to confer on the Trustee *additional rights beyond the mere title of the bankrupt to the property*, and, if that be so, what possible construction can be put upon the first part of sub-division 5 except that it was intended to confer upon the Trustee all of the rights which any person could acquire from the bankrupt. What else can the first part of sub. division 5 mean unless it should be construed to be a nullity; this construction should not be put upon any legislative act.

It will be readily seen that the bankrupt could have transferred this property to a subsequent purchaser, pledgee or mortgagee in good faith and have passed a good title as against the vendor (The Berlin Machine Works) and thus been within the express language of the section (70-a-5). It therefore follows that the Trustee by the terms of the Bankrupt Act occupies the relation of a purchaser in good faith.

Granting, for the sake of argument, that the Trustee in Bankruptcy is not a purchaser or pledgee in good faith as an actual fact, and granting that under the laws of the State of New York the conditional sale is not void as against execution creditors, still we take this position that it is void as against purchasers in good faith and that Miss Kellogg *could* have sold the property to a purchaser in good faith, and if she could have sold the property to a purchaser in good faith and as against him, under the conditional sales law of the State of New York, the reserved title would have been void and the sale absolute, Sec. 70-a, sub-division 5 of the Bankruptcy Act steps in and does the rest, to-wit: Transfers to the Trustee "the property which prior to the filing of the petition he (bankrupt) could by any means have transferred." In other words Clara E. Kellogg could have transferred this property to a purchaser in good faith, therefore, because of the phraseology of the new bankrupt act, the Trustee in Bankruptcy takes the title to such property, not because he is a purchaser in good faith, but because the statute says that he is vested "*by operation of law*" with the same title which a purchaser in good faith could have had, had the property been transferred by the bankrupt. We argue that the cases decided in states where the property could have been levied upon and sold under a judicial process are authorities for our contention herein, because those decisions give to the Trustee any title which the

bankrupt could have transferred under *those* statutes, or which could have been sold under *those* statutes. It is the same line of reasoning and depending upon two conditions—1st, the State Law; and, 2d, the Bankruptcy Law. If under the State Law the bankrupt could by any means have transferred the property, or if the property might have been levied upon and sold under judicial process against him, then in either case the Bankrupt Law says that the Trustee is vested "by operation of the law" with the title to that property.

The policy of the Bankrupt Act is to clothe the Trustee with title as against secret titles, liens and equities and compel everybody to comply with the state statutes or lose their title, lien or equity and to give the Trustee the protection which a purchaser in good faith or a creditor enjoys, and to prevent an action being brought against the Trustee for conversion years after he had sold the property and distributed the proceeds as an officer of this Court.

Clara E. Kellogg in fact conveyed the property in question to the C. E. Kellogg Co. for value and the Company conveyed it to the Trustree in Bankruptcy for the benefit of creditors, the reservation of title was void as against the C. E. Kellogg Co., void as against its grantee and void as against the Trustee in Bankruptcy.

II.

Actual Fraud.

The withholding from the files the conditional sale or failure to otherwise comply with the statute was an actual fraud upon creditors. The purpose of the

statute was to prevent conditional sales from remaining unpublished.

In re Garcewich. 8 A. B. R. 149-115 Fed. 87.
Frank v. Batten, 49 Hun. 91.
Moyer v. McIntyre, 43 Hun. 58.

If the vendee in any way pledges the property to an innocent party in good faith for however small an amount, the vendor is deprived of his title and lien. The property is pledged by the Trustee for borrowed money and expenses of administration.

Purchaser for Value Under the Lien Law.

The Receiver and Trustee is fairly within the definition of a purchaser for value under the Lien Law. He had no actual notice of the title notes until after he had accepted his trust, bound himself up to perform the duties of the Trustee, the compensation of which is based upon the amount of property coming into his hands. He had incurred liabilities either on his own account or on account of the general creditors to the amount of several thousands of dollars, which must be paid by some one, and the incurring of these liabilities on the faith of this property in possession of the bankrupt, without notice, made the Trustee either a lienor for value or a purchaser for value. The property covered by the title notes, as a matter of equitable practice, is chargeable with the lein of the expenses and obligations of the Receiver. The clear purpose of the act was to protect the money advances, at least, made on the faith of the property in the possession of the bankrupt. This point is an addition to the point urged above, that the Bankrupt Statute intended to protect the persons assuming the duties of the Trustee from the liabilities arising from secret liens and equities, and to give him all of the protection that existed in favor of a purchaser for

value as against such secret liens or secret equities. This construction of the statute is a fair construction and the reason for it might be illustrated by what might result in this case, namely, if the Trustee is liable for this reserve title, he would be liable for conversion for six years. He might sell the property in good faith and distribute the proceeds among the creditors and still, under the contention of the counsel for the vendors, he would be liable in an action of conversion for this property because, at the time he took it, he was not, as they claimed, within the protection of the lien law. *Congress had the right to give an officer of the United States Court this statutory protection, and it has done so by the statute cited.*

III.

The judgment of the United States Circuit Court of Appeals for the Second Circuit and of the District Court for the Western District of New York should be reversed and that of the Referee be affirmed.

FRANK H. ROBINSON,

Counsel for the Trustee,

Hornellsville, N. Y.

FILE COPY.

APR 21 1904

JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES

HEWIT AS TRUSTEE

vs.

THE BERLIN MACHINE WORKS.

No. 228.

By permission of the Court, I file this memorandum.

In Holden vs. Stratton, 191 U. S. 115, there was an *application made by the bankrupts* for exemptions of life insurance which was denied by the referee in bankruptcy. There was no *claim presented by any creditor* such as is contemplated by the Bankruptcy Act. In our case the Berlin Machine Works filed a claim (page 9, folio 26, "In the matter of claim of, etc.") This claim was rejected by the referee (page 13) and allowed by the District Judge at the value of the machinery, to wit, $1,200., making it a priority claim and allowing it for the balance of the debt (over $650., folio 105) as an unsecured general creditor (page 36, folio 106). An appeal was taken to the Circuit Court of Appeals from the judgment of the District Court, allowing the claim and an appeal was taken to this Court from the final decision of the Circuit Court of Appeals, allowing the claim after obtaining a certificate that the determination of the question involved in the allowance of the claim was essential to a uniform construction, etc. This case was taken to the Court of Appeals by appeal (see prayer for an appeal at foot of page 6, and allowance of appeal, folio 21). The decision of the Circuit Court of Appeals was a judgment allowing a claim of $500. or over.

It can make no difference what language is inadvertently used in the record; this case was in fact brought here as shown by the record, by appeal and the precaution was taken to bring it into the Circuit Court of Appeals, both by petition to review and upon appeal (folio 21, page 39) and it does not seem right to take an unfavorable view of the technical procedure. Why not overlook technicalities as the Counsel have done, and decide the merits?

How can this Court give any force or meaning to Section 25 A and B, if it denies to itself the right of hearing an appeal "from any final decision of a Court of Appeals allowing or rejecting a claim under the Bankruptcy Act." This is a new provision and renders the decisions under the Act of 1867 unavailing. If this Court now holds that because the allowance of a claim is not the end of the bankruptcy proceedings, that therefore the decision below is not final and not appealable, then of necessity the language of Section 25 A and B is rendered a nullity so far as allowing an appeal to the Supreme Court "*from the allowance of a debt or claim.*"

The Bankruptcy Court after filing the petition in bankruptcy has jurisdiction of the parties and subject matter and an independent suit cannot be maintained against the Trustee for the allowance of a debt or claim but claimant must come in and prove his claim as he has done in this case. (Sec. 57.)

The new provision in the Bankruptcy Act does not say an appeal may be had to the Supreme Court from the final order in the bankruptcy proceedings in which a claim was allowed or rejected or from a final judgment in an independent plenary action allowing or rejecting a claim but does read, "From any final decision of a Court of Appeals allowing or rejecting a claim UNDER THIS ACT." (Sec. 25 B.)

Any other construction of the Act would prevent any creditor or trustee from having the Supreme Court pass upon any claim however large the amount involved or however conflicting the decisions of the courts below might be.

The conflicting decisions of the court below, upon the points raised under Section 70 of the Bankruptcy Act, ought to inspire this Court to find a way to decide this appeal on the merits and I confidently expect it will do so.

Dated April 18th, 1904.

FRANK H. ROBINSON,

Of Counsel for Appellant,

Hornellsville, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

LOREN M. HEWITT, as Trustee in Bankruptcy of CLARA E. KELLOGG, *Appellant*, vs. THE BERLIN MACHINE WORKS, *Appellee*.	No. 228.

BRIEF FOR APPELLEE.

Statement of the Case.

This is an appeal (Record p. 39) from a decree of the United States Circuit Court of Appeals for the Second Circuit, (R. p. 38) affirming an order of the District Court of the United States for the Western District of New York (R. pp. 34, 35, 36), sustaining the claim of The Berlin Machine Works (R. pp. 9, 10, 11, 12), appellee herein, to certain machines, viz., two moulders theretofore sold and delivered by said appellee to Clara E. Kellogg, the above named bankrupt, under a conditional bill of sale, (R. pp. 25, 26), and reversing the order of the Referee in Bankruptcy made in pursuance of his opinion,(R. pp. 13, 14, 15, 16), denying the prayer of the petition of the Berlin Machine Works, that said moulders be declared to be the property of said The Berlin Machine Works, and that it be awarded the possession of the same.

FACTS.

In October, 1900, Clara E. Kellogg, resided an
was engaged in business at Canisteo, N. Y., i
operating a sash and blind plant, which she owne
at that place. (R. p. 18.)

The Berlin Machine Works was a corporatio
organized under the laws of the State of New York
having its main office at Beloit, Wisconsin, (R. pp
9, 10) engaged in the business of manufacturin
machinery.

On the 10th day of October, 1900, said Clar
E. Kellogg signed and delivered to a sales agen
of The Berlin Machine Works a written order fo
two moulders to be shipped to her as soon a
possible, for which she was to pay $1850.00 with
in four months after date of shipment, and whic
order provided that title to the machines mentione
should remain in The Berlin Machine Works unti
the machines were fully paid for in cash. (R. pp
25, 26.)

This order was accepted by The Berlin Machin
Works, October 19th, 1900, and the machines wer
thereafter shipped, pursuant to said order, one o
the 29th of October, 1900, and the other on th
16th of November, 1900, and were received b
Miss Kellogg at Canisteo, N. Y., and placed in he
plant and set in operation. (R. p. 18.)

On October 29th, 1900, when the first moulde
was shipped to Miss Kellogg, she made an
delivered to The Berlin Machine Works a promis
sory note for $925.00, the price of such machine
payable four months after date, in which note i

was stated that "title and right of possession of "the property for which this note is given "remains in The Berlin Machine Works until "fully paid for".

On November 16th, 1900, when the second machine was shipped, Miss. Kellogg gave a similar note for $925.00, the price of such machine, payable in four months after date, containing the same statement as to title as appeared in the first note. (R. p. 19).

Neither of said notes, nor any part of the purchase price of said machines was ever paid. (R. p. 19.)

On the 29th day of January, 1901, said Clara E. Kellogg, with intent to hinder, delay and defraud her creditors, transferred her said sash and blind plant, containing said moulders, to the C. E. Kellogg Company, a corporation organized for the purpose of taking over said property and of hindering and delaying the creditors of said Clara E. Kellogg and which Company knew of the fraudulent purpose of said Clara E. Kellogg in making such transfer and received such transfer of her property with like purpose. (R. p. 22.)

That on the first day of March, 1901, said Clara E. Kellogg was adjudged a bankrupt by the District Court of the United States for the Western District of New York, and on the 22nd day of March, 1901, Loren M Hewit, appellant herein, was chosen as trustee of the bankrupt's estate by the creditors of said bankrupt, and duly qualified and entered upon the discharge of his duties as such. (R. p. 18.)

That thereupon said trustee demanded of the C. E. Kellogg Company a reconveyance of the property transferred to it by said bankrupt, and afterwards began an action in the Supreme Court of the State of New York against said Clara E. Kellogg Company for the purpose of setting aside all transfers made by said Clara E. Kellogg to said C. E. Kellogg Company on the ground that said transfer was made with intent to hinder, delay and defraud the creditors of said Clara E. Kellogg.

Thereupon, said C. E. Kellogg Company did, under resolutions of its stockholders and directors, make reconveyance to said Loren M. Hewit as Trustee in Bankruptcy of said Clara E. Kellogg of the property so transferred to it by said Clara E. Kellogg, said Trustee claiming at the time of such reconveyance that the prior transfer by Clara E. Kellogg to said C. E. Kellogg Company had been made to hinder, delay and defraud the creditors of said Clara E. Kellogg. (R. p. 22, 23.)

Said Trustee thereby came into possession of said sash and blind plant, including said moulders so sold and delivered by The Berlin Machine Works, which machines were attached to the floor of the building in which they were located by screws, and could be removed therefrom without injury to the building. (R. pp. 20, 21.)

The Berlin Machine Works demanded said machines of said Trustee, who refused to deliver them or to permit said Berlin Machine Works to obtain the same, and on the 4th day of May, 1901, notified said Berlin Machine Works by letter that

he could not recognize its title to said machines. (R. p. 20.)

On the 16th day of May, 1901, a copy of the order of said Clara E. Kellogg for said machines, dated October 10, 1900, and of the acceptance thereof by said Berlin Machine Works, was filed in the office of the Town Clerk of the Town of Canisteo, N. Y., where said Clara E. Kellogg resided.

Thereafter said Berlin Machine Works filed its petition, verified May 31st, 1901, with the Referee in Bankruptcy, praying for a return of said moulders to it, and for such other relief as might be proper. (R. pp. 9, 10, 11, 12.)

The Referee, after taking testimony and hearing the parties in interest, decided against the claim of said Berlin Machine Works, holding it had lost the legal title to said moulders. (R. p. 16.)

The Berlin Machine Works brought this decision of the Referee before the District Court of the United States for the Western District of New York for review, which court reversed the order of the Referee and held that said Berlin Machine Works had valid title to said machines, and ordered the Trustee to deliver the moulders to the Berlin Machine Works; or, in the event that said machinery had been, that the Trustee pay to the Berlin Machine Works the sum of Twelve hundred dollars, which sum said court determined to be the value of said machines. (R. p. 35, 36.)

From this order the Trustee appealed to the United States Court of Appeals for the Second Circuit, where the order of the District Court was

affirmed, and said Trustee has now appealed from such order of affirmance to this court.

POINTS.

I.

At common law a vendor of chattels may lawfully make it a condition of his sale that title to the property shall remain in him until the purchase price is fully paid, and under such a conditional sale, title will not pass to the vendee until the condition be fulfilled.

2nd Kent, 12th Ed., 498.
Benjamin on Sales, Sec. 320.
Ballard vs. *Burgett*, 40 N. Y., 314.
Cole vs. *Mann*, 62 N. Y., 1.
Boon vs. *Moss*, 70 N. Y., 465, 473.
Graves Elevator Co. vs. *Callanan*, 11 App. Div., 301.
Davison vs. *Davis*, 125 U. S., 90.

II.

The common law in respect to conditional sales has been somewhat modified by Statute in many of the States, without, however, any uniformity of legislation on the subject.

The Statute of the State of New York in force in 1900 and 1901, in respect to conditional sales, being Section 112 of Chapter 418 of the Laws of 1897, is as follows:—

"CONDITIONS AND RESERVATIONS IN CON-
"TRACTS FOR SALE OF GOODS AND CHATTELS.—

"Except as otherwise provided in this article, "all conditions and reservations in a contract "for the conditional sale of goods and chattels, "accompanied by immediate delivery and con- "tinued possession of the thing contracted to be "sold, to the effect that the ownership of such "goods and chattels is to remain in the con- "ditional vendor or in a person other than the "conditional vendee, until they are paid for, or "until the occurrence of a future event or con- "tingency shall be void as against subsequent "purchasers, pledgees or mortgagees in good "faith, and as to them the sale shall be deemed "absolute, unless such contract of sale, contain- "ing such conditions and reservations, or a "true copy thereof be filed as directed in this "article."

The Statute of Connecticut provides:—

"All conditional sales of personal property "which shall not be made in conformity with "the provisions of the preceding Section (as to "filing, etc.,) *shall be held to be absolute sales, "except as between the vendor and vendee, or "their personal representatives.*"

The Statute of Iowa provides:—

"No sale of personal property where the "vendor retains actual possession thereof is "valid *against existing creditors*, or subsequent "purchasers without notice, unless a written "instrument conveying the same is executed, "acknowledged and filed for record with the "recorder of the county where the holder of the "property resides."

These varying Statutes account for varying decisions in different jurisdictions in respect to the validity of conditional sales. For instance, in re *Yukon Woolen Co.*, 2 Am. Bankruptcy Reports, 804, having arisen in Connecticut, was probably well decided under the Connecticut Statute, but could not be supported under the Statute of New York.

And so with *Matter of Kindt*, 2 National Bankruptcy News and Reports, 369, which arose in Iowa.

III.

Statutes changing the common law must be strictly construed, and the common law must be held no further abrogated than the clear import of the language used in the Statute absolutely requires.

Fitzgerald vs. *Quann*, 109 N. Y., 441, Opinion by PECKHAM, J.

IV.

The contract between The Berlin Machine Works and Clara E. Kellogg, that title to the moulders ordered by and delivered to her shall remain in The Berlin Machine Works until fully paid for, is valid.

It will be observed that under the Statute of the State of New York conditions like the one in question in a contract for the conditional sale of chattels accompanied by immediate delivery and continued change of possession shall be void *only* as

against "*subsequent purchasers, pledgees or mort-*
"*gagees in good faith,*" and *as to them*, the sale shall be deemed absolute, unless the contract or a copy be filed as required by the Statute.

Therefore, such contracts are valid in New York, whether filed or not, as against creditors and all the world, except only the limited class specified in the Statute, viz: "Subsequent purchasers, pledgees "or mortgagees in good faith."

P. T. & S. Co. vs. *Schirmer*, 136 N. Y., 305.

It will also be observed that the New York Statute in reference to conditional sales differs materially from the Statutes of the same state in respect to chattel mortgages and fraudulent conveyances; e. g. an unfiled chattel mortgage is void as against *creditors*, but creditors obtain no benefits because of failure to file a contract for the conditional sale of property.

A careful examination of the record on this appeal fails to discover any "subsequent purchaser, "pledgee or mortgagee in good faith." Hence, there is no one who can question the validity of the contract under consideration, or of the conditions contained in it, nor who can claim that the sale of the moulders was absolute as to him, under the statute.

If it be claimed that the conveyance by Clara E. Kellogg to the C. E. Kellogg Company is in any manner or to any extent a factor adverse to the rights of The Berlin Machine Works, an effectual answer is found in the facts reported by the Referee, that such conveyance was made to hinder, delay

and defraud the creditors of Clara E. Kellogg, of which intent the C. E. Kellogg Company had knowledge and that it received such conveyance with like intent. (R. p. 22.)

It is only purchasers *in good faith* who can claim the benefit of the statute.

V.

The Trustee in Bankruptcy (the appellant here) is not a purchaser in good faith, and has no greater right to the machines in question than had the bankrupt.

2nd Storys Eq. Jur. Sec., 1228.
Winsor vs. *McClellan*, 2 Story, 630.
Greatman vs. *Savings Institution*, 95 U. S., 764.
Stewart vs. *Platt*, 101 U. S., 731.
Hanselt vs. *Harrison*, 105 U. S., 401-406.
Chattanooga Nat. Bank vs. *Rome Iron Co*, 102 Fed. Rep., 755.
In re. *N. Y. Economical Printing Co.*, 110 Fed. Rep., 514.

VI.

The Bankrupt Act of 1898 does not confer on a trustee in bankruptcy any greater rights than the bankrupt possessed, in respect to property obtained by the bankrupt under a conditional bill of sale.

Casey vs. *Cavaroo*, 96 U. S., 467, (law of 1867.

Chattanooga Nat. Bank vs. *Rome Iron Co.*, 102 Fed Rep., 755.

In re. *N. Y. Economical Printing Co.* 110 Fed Rep., 514.

In re. *Bozeman*, 2 Amer. Bank Rep. 809.

In re. *Garcewich*, 8 Amer. Bank Rep., 149.

In re. *McKay*, 1 Amer. Bank Rep., 292.

Section 70 (*a*) Bankruptcy Law of 1898.

The Statute Sec. 70 (*a*), Act of 1898, is as llows:

"The trustee of the estate of a bankrupt "upon his appointment and qualification, * * * "shall * * * be vested by operation of law *with "the title of the bankrupt*, as of the date he "was adjudged a bankrupt, * * * to all * * * "(5) property which prior to the filing of the "petition he could by any means have trans- "ferred, or which might have been levied upon "and sold under judicial process against him."

By the plain provision of the law, therefore, *the rustee is vested with the title of the bankrupt, he tands* in the shoes of the bankrupt, and in the ase at bar the trustee acquired only the right of he bankrupt, and nothing more.

VII.

The order appealed from should be affirmed, with costs.

JOHN L. ROMER,
Counsel for Appellee,
Buffalo, N. Y.

Supreme Court of the United States.

No. 228.—October Term, 1903.

Loren M. Hewit, as Trustee in Bankruptcy of Clara E. Kellogg, Appellant, vs. The Berlin Machine Works. | Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[May 16, 1904.]

Loren M. Hewit, as trustee in bankruptcy of Clara E. Kellogg, applied to the United States District Court for the Eastern District of New York for an order of sale of certain real estate, buildings and machinery. Notice to creditors was given, and thereafter the Berlin Machine Works, a corporation, filed its petition, praying, on grounds set forth, to be declared the owner of certain machines included in the property and be awarded possession thereof, and that they be exempted from sale, or that it be determined that the corporation is entitled to be first paid out of the proceeds of the sale of the machines and to share in dividends on any unpaid balance. The matter was heard before the referee, who held that the corporation had lost the legal title to the machines, and must come in as an unsecured creditor. The corporation petitioned the District Court for a review of the referee's decision, the referee made his certificate and return, and the matter was submitted to the court, which thereafter reversed the decision of the referee and adjudged that the Berlin Machine Works had a good and valid title to the machines, and that the same be delivered to it, or, in the event that they had been disposed of, that the trustee pay over to the Berlin Machine Works the sum of twelve hundred dollars, the value of the machines. 112 Fed. Rep. 52.

The trustee then filed a petition in the District Court making application for revision and review in matter of law, and appealed to the Circuit Court of Appeals for the Second Circuit from the judgment of the District Court, and the District Court ordered "that a superintendency and revision and review in matter of law and an appeal be and the same hereby is allowed in the above-entitled proceedings to the Circuit Court of Appeals, Second Circuit of the United States." The Circuit Court of Appeals affirmed the judgment of the District Court, 118 Fed. Rep. 1017, and thereupon an appeal was allowed to this court.

Mr. Chief Justice Fuller delivered the opinion of the Court:

If the trustee had carried the case to the Circuit Court of Appeals on petition for supervision and revision under section 24*b* of the bankruptcy

law, the case would have fallen within *Holden* v. *Stratton*, 191 U. S. 115, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those "controversies arising in bankruptcy proceedings" over which the Circuit Court of Appeals could, under section 24*a*, exercise appellate jurisdiction as in other cases. Section 25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, *Holden* v. *Stratton supra*, while section 24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by section 2, to settle the estates of bankrupts and to determine controversies in relation thereto. *Hutchinson* v. *Otis*, 190 U. S. 552; *Burleigh* v. *Foreman*, 125 Fed. Rep. 217.

The appeal to this court then followed under section 6 of the act of March 3, 1891.

This brings us to the consideration of the case on the merits. The material facts are these: October 10, 1900, Clara E. Kellogg contracted with the Berlin Machine Works for the purchase of two wood working machines at the price of $1,850, payment to be made within four months from date of shipment, and title to the property to remain in the machine company until fully paid for. The machines were shipped to Kellogg, October 29 and November 16, respectively, and were received by her, set up in her planing mill, and put in operation. October 29 and November 16 she signed and delivered to the machine company in payment for the machines two promissory notes for $925 each, payable in two and four months from their respective dates, to the order of the machine company, and each containing the following clause: "Title and right of possession of the property for which this note is given remains in the Berlin Machine Works until fully paid for." Kellogg, on her voluntary petition, was adjudicated a bankrupt, March 1, 1901, and a trustee was selected March 22, and thereafter duly qualified. The notes have not been paid and were mentioned in the schedules as secured claims, the security being the machines in question. It also appeared that January 21, 1901, Clara E. Kellogg, being insolvent, executed a conveyance of the planing mill to a corporation called the C. E. Kellogg Company, which being attacked as fraudulent, the property was voluntarily released to the trustee, all the capital stock of the company, the entire consideration of the alleged transfer, being surrendered to the company.

This sale was a conditional sale and the title did not pass to the vendee because the condition was not fulfilled, *Ballard* v. *Burgett*, 40 N. Y. 314;

Cole v. *Mann*, 62 N. Y. 1, unless the statutes of New York otherwise provided. The applicable statute is section 112 of chapter 418 of the Laws of 1897, which reads as follows:

"Conditions and reservations in contracts for sale of goods and chattels: Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article."

It is admitted that the machine company did not comply with the statute until after the appointment and qualification of the trustee, but if the trustee was not a subsequent purchaser, pledgee or mortgagee in good faith, the omission to file the contract of sale was immaterial. *Prentiss Tool & Supply Company* v. *Schirmer*, 136 N. Y. 305.

Did the trustee occupy the position of a subsequent purchaser, pledgee or mortgagee in good faith? We dismiss the pretended conveyance by Kellogg to the Kellogg Company from discussion as the District Court did, as it was attacked as fraudulent and without consideration, and was voluntarily released to the trustee, who derived no title thereby, and had none other than by operation of law.

Section 70*a* of the bankruptcy law provides:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, . . . to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The District Court, Hazel, J., held that the reasonable construction of this provision was that the trustee was vested with the title which the bankrupt had to property situated as described, and not otherwise, and quoted from the opinion of the Circuit Court of Appeals for the Second Circuit in the case of *In re New York Economical Printing Company*, 110 Fed. Rep. 514, upholding that view, as follows: "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is

fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee." And the Circuit Court of Appeals, adhering to that decision, held in this case that, inasmuch as by the New York statute a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the District Court was right, and affirmed the judgment. 118 Fed. Rep. 1017.

We concur in this view, which is sustained by decisions under previous bankruptcy laws, *Winsor* v. *McLellan*, 2 Story, 492; *Donaldson* v. *Farwell*, 93 U. S. 631; *Yeatman* v. *Savings Institution*, 95 U. S. 764; and is not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors.

In our opinion, these machines were not, prior to the filing of the petition, property which, under the law of New York, might have been levied upon and sold under judicial process against the bankrupt; nor could she have transferred it within the intent and meaning of section 70*a*. See *Low* v. *Welch*, 139 Mass. 33. The company's title was good as against the trustee, who could not claim as a subsequent purchaser in good faith.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.